No. 80-1177

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JOHN A. "JOHNNIE" CUMMINGS, Sheriff
of Clinton County, Kentucky, Albany,
Kentucky and
NEAL GUFFEY, Deputy Sheriff of Clinton
County, Kentucky, Albany, Kentucky
PETITIONERS

versus

RANDALL DOBBS,
GEORGE RAY GUFFEY and
WESLEY AARON RIDDLE
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(Cummings, et al. v. Dobbs, et al.)
(U.S.C.A. 6th Cir. No. 79-3150)

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether, at the trial of a Civil Rights case, the jury may receive evidence, as being part of Plaintiff's damages, of attorneys' fees paid to defend criminal charges placed by defendants, when the Civil Rights case arises out of said arrest and charges, and the criminal cases have not been finally concluded.

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The Respondents, Randall Dobbs, George Ray Guffey and Wesley Aaron Riddle, respectfully pray that this Court deny the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on the 29th day of October, 1980.

COUNTERSTATEMENT OF THE CASE

This was an action brought under 42 USC §1983 in 1974 by Respondents against Petitioners, alleging that they were assaulted and battered and humiliated and embarrassed when arrested by Petitioners on a variety of criminal charges.

Respondents (then Plaintiffs) also alleged that they incurred certain expenses as attorneys' fees at that time for their defense as to the particular incident sued upon.

Routinely, their bonds were posted and early appearances made as to these criminal charges. This was in 1974, and, to date, Petitioners have taken no further action as to the prosecution of these cases.

In the case from which this Petition for Certiorari arises, tried in 1978, they testified as to the general assault committed against them by the Petitioners. Among their damage elements, they gave testimony, uncontradicted by Petitioners, as to these attorneys' fees they had incurred.

The jury returned verdict in favor of each Respondent in an amount of $3,150.00 as compensatory damages, and $7,500.00 as punitive damages.

SUMMARY OF ARGUMENT

1. THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY, AND WAS CORRECTLY DECIDED.

2. ONLY QUESTIONS OF FACTUAL FINDINGS ARE INVOLVED, AND WERE CORRECTLY DECIDED BELOW.

3. PETITIONERS' POINT IS UNSUBSTANTIAL, AND WITHOUT MERIT.

REASONS FOR DENYING THE WRIT

I

THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY, AND WAS CORRECTLY DECIDED

May we begin by emphasizing that there is not here involved before this Court a fee award to Respondents under 42 USC §1988. Rather, Petitioners assert that the Trial Court erred in allowing Respondents to testify as to their attorneys' fees, among their other damages sustained, in regard to the actions of Petitioners originally sued upon.

As pointed out, Respondents had sued for assault and battery and the infliction of summary punishment upon them at the time of their arrest by Petitioners; indeed, they alleged all damages incident thereto.

It is entirely settled that recovery may be had in an action under the Civil Rights Act for bodily assault and unnecessary force employed against the plaintiffs. Here, additionally, Respondents had necessarily incurred

attorneys' fees to defend the charges placed against them at the time of Petitioners' assaults against them.

In permitting evidence as to this, the Court was squarely in line with Kerr v. Chicago, (1970, CA7 Ill) 424 F2d 1134, cert den 400 US 833, 27 L Ed 2d 64, 91 S Ct 66, holding that attorneys' fees to defend state criminal actions are properly recoverable in a 42 USC §1983 action where such expenditure was a foreseeable result of the acts of the defendant.

In this type of proceeding, the Trial Court is empowered to afford equitable relief, and do whatever is necessary to enable Plaintiff to recover his actual damages; Myers v. Anderson (1915) 238 US 368, 59 L Ed 1349, 35 S Ct 932.

For a case in which back pay was allowed to a plaintiff, as part of his damages, see Owen v. Independence, (1977, CA8 Mo) 560 F2d 925, vacated on other grounds 438 US 902, 57 L Ed 2d 1145, 98 S Ct 3118, on remand (CA 8 Mo) 589 F2d 335.

It has frequently been pointed out that as the Civil Rights Act is remedial legislation,

it is not to be interpreted narrowly, but is to be given a liberal construction; Basista v. Weir (1965, CA3 Pa) 340 F2d 74.

Respondents submit that both the Trial Judge and the Sixth Circuit ruled correctly that they were entitled to testify in regard to attorneys' fees incurred for the defense of the criminal charges against them as a result of Petitioners' acts, for which they sued Petitioners under 42 USC §1983.

II

ONLY QUESTIONS OF FACTUAL FINDINGS ARE INVOLVED, AND WERE CORRECTLY DECIDED BELOW

In their Petition for a Writ of Certiorari, at page 4, Petitioners mis-state the record in this case in saying:

> "The record discloses that this was the only element of damage incurred by the Respondent in this action."

They were referring to the attorneys' fee element, in which matter they were in error; similarly, they must have meant to say "Respondents."

At any rate, in its Order of October 29, 1980, the United States Court of Appeals for the Sixth Circuit said (see Petitioners' Appendix):

> "Plaintiffs testified that defendants kicked and punched them and beat at least one with a club; threatened them and their companions with a gun; dragged one face down along a gravel driveway and pulled the hair out of another, all without provocation."

Therefore it certainly cannot be accurately said that the small charge to defend the criminal cases placed against them was the only damage element that Respondents sustained.

It is further pointed out that Respondents pled all their damages from the beginning, and testified as to same. Petitioners are catching at straws when they claim that the damage element as to Respondents' attorneys' fees was not "verified" by their attorneys. Why <u>should</u> it have been? -- the Respondents themselves testified as to same, and their testimony was uncontroverted, anyway.

We further urge that in view of the severe physical assault upon Respondents by Petitioners,

it is most unlikely that Respondents' claim for these attorneys' fees was the predominant or deciding factor as to these verdicts herein.

Indeed, the major portion of these verdicts were for punitive damages, another aspect of the case affirmed by the Sixth Circuit in its Order.

Punitive damages are fully recoverable in an action under 42 USC §1983; Caperci v. Huntoon, (1968, CA1 Mass) 397 F2d 799, cert den 393 US 940, 21 L Ed 2d 276, 89 S Ct 299; Basista v. Weir, (1965, CA3 Pa) 340 F2d 74.

From the above, it is clear there was no error, below, as to the admission of evidence to enable the jury to make its factual findings in this case.

III

PETITIONERS' POINT IS UNSUBSTANTIAL, AND WITHOUT MERIT

Concluding, Respondents submit to this Court that there is no substantial Federal question here involved as would justify this Court's granting its Writ of Certiorari to review this case. At best, any final determination hereof

will affect only the parties herein, and very little else.

Respondents also point out that the cases cited by the Petitioners run counter to their own theory as to why they should be afforded the relief they seek.

Luckett v. Cohen, 169 Federal Supp. 808, was a case wherein damages were not allowed in a situation where no claim was made as to them. However, the reverse is true in the case here before this Court.

And in Union Leader Corporation v. Newspapers of New England, Inc., 218 F. Supp. 490 (1963), the Court pronounced that one's claim for attorneys' fees can be an element of damages to a person who has sustained provable loss. It is unknown to Respondents why Petitioners conjecture that this case is helpful to them.

CONCLUSION

For the foregoing reasons, Respondents urge this Court that its Writ of Certiorari should not issue to review the herein judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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February 13, 1981

CERTIFICATION

I do hereby certify, as Counsel of Record for the Respondents herein, and as a member of the Bar of this Court, that I have served three copies of this Respondents' Brief in Opposition to Certiorari upon Counsel for Petitioners, Honorable Robert L. Bertram, West Cumberland Avenue, Jamestown, Kentucky, 42629 and Honorable Eddie C. Lovelace, 104 Cumberland Street, Albany, Kentucky, 42602, and each of them, by mailing same to them at their respective office addresses above set out, by first-class United States mail, postage pre-paid, this 13th day of February, 1981. I further certify that all parties required to be served in this cause have been served.

Daniel T. Taylor

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